Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338

REPLY COMMENTS OF LORMAN EDUCATION SERVICES

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SUMMARY

By enacting the Junk Fax Prevention Act of 2005, Congress reversed the 2003 determination by the FCC that an established business relationship ("EBR") did not permit a sender to fax advertisements to a recipient. In reversing the FCC, Congress was very careful not to give the Commission much leeway to adopt rules weakening the EBR exception to the general rule against unsolicited fax advertisements. While the Commission was given limited authority to (i) impose a limit on the duration on EBRs and (ii) allow non-profit trade and professional organizations to omit the opt-out notices required by the Junk Fax Prevention Act ("JFPA"), in both cases Congress required the FCC to make specific threshold findings before it could do so.

In a Notice of Proposed Rule Making ("NPRM") in Docket No. 05-338, released on December 9, 2005, the FCC sought comment on these and other issues related to the JFPA. There was a consensus among commenting businesses and trade associations that the FCC does not at this time have authority and could not make the required threshold findings to impose a durational limit on EBRs; that imposing a durational limit on EBRs would be wrong as a matter of policy; and that if the FCC were nevertheless to impose a limit, it should be significantly longer than the limit imposed on telemarketing calls to residential consumers. Lorman urges the Commission to recognize this reality and to not attempt at this time to cut back on the EBR exemption so recently adopted by Congress.

Commenting non-profit trade and professional associations urged the Commission to exercise its discretion to exempt them from the notice requirements of the JFPA. Lorman, on the other hand, showed why association members need such notices to inform them of their right not to receive future fax advertisements from associations and how to exercise that right. The

omission of notices would likely confuse many members into believing, falsely, that they did not have a right to opt out, particularly when they receive faxes offering identical products and services from businesses that do inform them of their right and tell them how to opt out.

Associations argue that they would be unduly burdened by the notice requirements. Lorman demonstrates below that the only fairly cognizable burden would be including several lines of clearly-legible text on the first page of fax advertisements sent to association members. By their own admission, the real reason that associations want to be exempted is that they fear the inclusion of opt-out information will result in a greater number of their members exercising their right not to receive fax advertisements, thereby reducing the associations' revenues from marketing campaigns peddling, among other things, credit cards, cruises, rental cars, and office supplies—often in concert with a for-profit "business partner." Associations hope to avoid this feared loss of revenue by seeking to keep their members in the dark regarding their rights. Several commenting associations appear to believe, or at least argue, wrongly, that their members do not have a right to opt out from receiving faxed advertising or that associations may choose not to honor opt-out requests, and suggest that members always have the option of resigning from the association. This powerless, not-in-control view of recipients—including association members—is not what Congress wrote into the law.

The associations in question are not charitable or humanitarian organizations—they exist to increase business profits, just as for-profit businesses do. Further, their relationships with their members are remarkably similar to the relationships between businesses and their customers. Associations and businesses are both dependent on their clientele, which they must please or lose. And a fax offering a credit card, vacation, or rental car is still a fax offering a credit card, vacation, or rental car irrespective of whose name appears at the top. Recipients may

appreciate the offer or not—Congress decided they should control whether to keep receiving such faxes regardless of the identity of the sender. The only question for the Commission is whether it would be helpful for association members to be informed how to stop such faxes.

Additionally, because Congress limited any possible notice exemption to faxes sent to association members "in furtherance of [the associations'] tax-exempt purpose[s]," exempting associations from the notice requirements would involve the FCC each time there was a complaint in myriad determinations of the tax-exempt purpose of each association and of each of the faxes it sends. While the Internal Revenue Code and the decisions of the Internal Revenue Service could provide somewhat of a framework for these determinations, unfortunately the relevant law is both complex and uncertain—and highly fact-specific, requiring each association project to be analyzed thoroughly under these complex rules. It is easy for associations to say, "Follow the IRS"—but it would be a nightmare for the Commission to actually attempt to do so. Lorman urges the Commission not to exempt non-profit trade and professional associations from the notice requirements of the JFPA.

In addition to the special treatment sought by associations regarding the notice requirements, some commentors ask for additional, interest-specific favors. Lorman urges the FCC to refrain from granting special interest requests for industry- or constituency-specific rules. The statute does not provide for such special treatment and the record does not support it.

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REPLY COMMENTS OF LORMAN EDUCATION SERVICES

Lorman Education Services ("Lorman"), a division of Lorman Business Centers, Inc., hereby respectfully submits its reply comments in response to the Notice of Proposed Rule Making ("NPRM") in Docket No. 05-338, released on December 9, 2005,[1] and the comments filed in response to the NPRM. Pursuant to the Junk Fax Prevention Act of 2005 ("JFPA"),[2] which amends the Telephone Consumer Protection Act of 1991 ("TCPA"),[3] the NPRM seeks comment on a number of issues related to the forthcoming, statutorily-directed implementation by the Federal Communications Commission ("FCC") of regulations implementing the JFPA.[4] The comment period ended on January 18, 2006.

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1 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 [and] Junk Fax Prevention Act of 2005,* Notice of Proposed Rulemaking and Order, CG Dkt. 02-278, 05-338, FCC 05-206 (rel. Dec. 9, 2005) ("NPRM"); 70 Fed. Reg. 242 (Dec. 19, 2005).

2 Pub. L. No. 109-21, 119 Stat. 359 (2005).

3 Pub. L. No. 108-10, 117 Stat. 557 (2003), codified at 47 U.S.C. § 227.

4 Pursuant to Section 2(h) of the JFPA, the Commission must issue implementing regulations no later than April 5, 2006.

I. ISSUES ADDRESSED

Lorman agrees with the consensus of commenting businesses and associations that the FCC does not have authority at this time to limit the duration of EBRs, and that such a limitation would in any case be bad policy. Section II.A addresses the issue of durational limits on EBRs as raised in the comments. In particular, Lorman argues that by imposing notice and opt-out requirements on senders of fax advertisements, Congress has appropriately balanced the burdens and benefits of fax advertising between senders and recipients. Only if this balance turns out to be wrong, based on complaints received in the future, does the Commission have authority to exercise the discretion provided by Congress to make adjustments.

Section II.B responds to the comments of non-profit trade and professional associations, which urge the Commission to exempt them from the notice requirements of the JFPA. Many of the commenting associations seem to believe that an exemption would relieve them of the obligation to maintain opt-out procedures and to honor opt-out requests from their members, and not just the obligation to notify their members that they have that right. Even should the FCC decide to exempt associations from the notice requirements, Lorman urges it to clarify that they must still maintain opt-out procedures and honor opt-out requests from their members. However, Lorman strongly believes that the Commission should *not* exempt associations from the notice requirements, as discussed in Section II.B.

Finally, in Section II.C Lorman urges the Commission not to adopt industry- or constituency-based rules, but to adopt proper rules of general applicability.

II. ARGUMENT

A. The Commission Has Only Limited Authority to Regulate the Duration of Established Business Relationships; The Filed Comments Do Not Supply Any Justification for Exercising That Limited Authority

It is the clear consensus of business interests—which are not only senders, but also the recipients of most commercial faxes—that the FCC does not, at this time, have authority to impose limits on the duration of EBRs; that such limits would be wrong as a matter of policy; and that, if the FCC were in the future to impose time limits on EBRs, the limits that govern telemarketing would not be appropriate for commercial faxing. Lorman supports this consensus and notes that the handful of commentors urging the imposition of time limits have failed to justify such an imposition, particularly in light of the notice and opt-out provisions of the JFPA.

1. The Conditions Precedent Set by Congress Have Not Been Met And the Burden Which Would be Imposed on Businesses Cannot Be Justified

As many commentors have pointed out, Congress clearly intended for the Commission's review of complaints to cover only the time *after* the FCC adopts regulations implementing the JFPA, in order to judge the real-world effects of that Act's notice and opt-out provisions and to determine whether they prove to be insufficient protection absent the adoption of durational limits on EBRs.[5] Therefore, not only have the threshold conditions set by Congress not been met, *they could not, even in principle, have been met at this time* because the period during which a history or pattern of complaints are to be evaluated will not even have begun until this rulemaking concludes.

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[5] *See, e.g. Comments of Reed Elsevier,* CG Dkt. 05-338 at 4–5 (filed January 18, 2006); *Comments of Consumer Bankers Association,* CG Dkt. 05-338 at 9–10 (filed January 18, 2006); *Comments of the National Newspaper Association and Newspaper Association of America,* CG Dkt. 05-338 at 10 (filed January 18, 2006); *Comments of the Mortgage Finance Coalition,* CG Dkt. 05-338 at 8–9 (filed January 18, 2006); *Comments of the American Bar Association,* CG Dkt. 05-338 at 4 (filed January 18, 2006); *Comments of the National Association of Wholesaler-Distributors,* CG Dkt. 05-338 at 6 (filed January 18, 2006).

Further, limits on the duration of EBRs are unnecessary and would be wrong as a matter of policy because the JFPA's notice and opt-out requirements adequately protect recipients and properly balance the benefits and burdens of commercial faxing between senders and recipients. There is simply no justification for placing on businesses, and particularly on small businesses, the onerous burden of altering customer lists and communications databases on a daily basis when the corresponding benefit to recipients would be so slight.[6]

The conditions precedent for the FCC to have authority to impose a limit on the duration of EBRs have not occurred. Further, for sound policy reasons, imposing such a limit would be a mistake. Lorman previously documented, with its own real-world business data, the significant loss of revenues that an artificial time limit on EBRs would impose.[7] This dramatic revenue loss would occur specifically because so many repeat customers expect and appreciate the fax reminders they receive notifying them of upcoming seminars, and respond affirmatively by registering for these programs. Without the faxed reminders, many would fail to register and would miss programs of interest.

The revenue loss for Lorman and for other companies losing repeat business would be aggravated by the substantial cost of having to amend customer lists on a daily basis, to track and compare each customer's original or most recent transaction date with the artificial time period, to alter each fax distribution program daily based on their changing lists, and to be able to prove, months or years later should they face an inquiry or complaint, the date the customer first

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6 *Comments of Reed Elsevier*, CG Dkt. 05-338 at 6 (filed January 18, 2006); *Comments of The American Bankers Association*, CG Dkt. 05-338 at 4 (filed January 18, 2006); *Comments of the National Newspaper Association and Newspaper Association of America*, CG Dkt. 05-338 at 10–11 (filed January 18, 2006); *Comments of the American Teleservices Association*, CG Dkt. 05-338 at 3 (filed January 18, 2006) ("First and foremost, ATA does not specifically endorse the imposition of time limits on the duration of the EBR in the context of facsimile advertisements.").

7 *Comments of Lorman Education Services*, CG Dkt. 05-338 at 12–13 and Appendix (filed January 18, 2006).

established a relationship, any intervening or continuing transactions, and the date the fax was sent.

2. The Telemarketing Time Limit Would Not Be Appropriate for Fax Advertising

Even if the Commission were to find it had the authority—and the record required by Congress before it could act—as many commentors point out, the 18-month/3-month time limit on EBRs applicable to telemarketing would not be appropriate for fax advertising.[8] First, the JFPA regulates fax advertisements sent to businesses as well as residential consumers, while the TCPA regulates telemarketing only to residential consumers and does not regulate telemarketing to businesses. Second, many business cycles are longer than 18 months, so an 18-month EBR would frustrate the expectations and normal dealings of business customers.[9] Even should the FCC decide to impose a time limit on EBRs, notwithstanding the arguments in the filed Comments highlighted above, it must recognize the critical differences between the TCPA and the JFPA and adopt a time limit appropriate for fax advertisements, which Lorman believes would be 5 years.

Nevertheless, several individual commentors and consumer groups advocated applying a shorter durational limit to EBRs in the fax context than in the telemarketing context.[10] Four of

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[8] *Comments of Reed Elsevier*, CG Dkt. 05-338 at 3–4 (filed January 18, 2006); *Comments of the National Association of Realtors*, CG Dkt. 05-338 at 7 (filed January 18, 2006) ("The Commission cannot simply rely on the FTC's homework in a related class to claim that its assignment is complete."); *Comments of the National Newspaper Association and Newspaper Association of America*, CG Dkt. 05-338 at 10 (filed January 18, 2006); *Comments of the Direct Marketing Association*, CG Dkt. 05-338 at 11 (filed January 18, 2006); *Comments of the Office of Advocacy, U.S. Small Business Administration*, CG Dkt. 05-338 at 7 (filed January 18, 2006).

[9] *Comments of Reed Elsevier*, CG Dkt. 05-338 at 6–7 (filed January 18, 2006); *Comments of the Yellow Pages Association*, CG Dkt. 05-338 at 4–5 (filed January 18, 2006); *Comments of the National Newspaper Association and Newspaper Association of America*, CG Dkt. 05-338 at 11–12 (filed January 18, 2006); *Comments of the National Association of Wholesaler-Distributors*, CG Dkt. 05-338 at 7–10 (filed January 18, 2006);

[10] *See Comments of Wayne G. Strang*, CG Dkt. 05-338 at 4 (filed January 6, 2006); *Comments of Robert Biggerstaff*, CG Dkt. 05-338 at 20–21 (filed January 9, 2006); *Comments of the Electronic Privacy Information Center*, CG Dkt. 05-338 at 3 (filed January 18, 2006) *Comments of the State Attorneys General*, CG Dkt. 05-

these[11] base their arguments on the burdens imposed on recipients in the form of fax supplies.[12] Congress was well aware of these long-standing arguments about the costs of paper, toner, etc. These commentors ignore the fact that Congress resolved this debate by adopting into law an EBR exemption that the FCC had abandoned, complementing it with the notice and opt-out requirements in the JFPA to provide recipients the tools they need to control the flow of fax advertisements from senders with which they have a business relationship. Only if, after the JFPA with this new regime is implemented, the FCC receives a substantial number of complaints, and a substantial portion of those complaints implicate EBRs of long duration, would the Commission have authority to impose any time limit, much less one of such a short duration in this fax context.

The Electronic Privacy Information Center argues that the duration of EBRs relied on by fax advertisers should be "as limited as possible . . . [c]onsidering the low bar for the EBR and the abuse that the exemption has already created . . . ."[13] Lorman does not agree that the "bar" is low, in the first instance. Rather, Congress recognized the commercial context in which this faxing takes place, continuing customer/supplier relationships, reliance and expectations, and the opt-out tools given to recipients.

In any event, the standard for establishing EBRs was set very exactingly by Congress with the clear intent that the Commission not have discretion to change it. Congress was exceedingly plain regarding the showing necessary for the FCC to have the authority to impose a

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338 at 11–12 (filed January 18, 2006); *Comments of the Privacy Rights Clearinghouse*, CG Dkt. 05-338 at 2–3 (filed January 18, 2006).

[11] Strang, Biggerstaff, the State Attorneys General, and the Privacy Rights Clearinghouse.

[12] Privacy Rights Clearinghouse also argues that fax communications are "more intrusive" than telemarketing calls. *Comments of the Privacy Rights Clearinghouse*, CG Dkt. 05-338 at 2 (filed January 18, 2006).

[13] *Comments of the Electronic Privacy Information Center* at 3.

time limit, and it has nothing to do with the establishment of EBRs. Rather, it requires that there be substantial evidence that senders relying on EBRs of long duration have been the cause of a significant portion (and a significant number) of complaints to the FCC. Additionally, whatever alleged but undocumented "abuse the [EBR] exemption has already created" according to this commenter has *not* been the result of the EBR that Congress is interested in—the one it enacted with the JFPA—with its notice and opt-out requirements.[14]

Realizing the recordkeeping, implementation, and later proof burdens that would be imposed by a durational limit on EBRs, the critical differences between fax advertising and telemarketing, and the business and residential contexts for those different laws and rules, Congress balanced the interests of senders and recipients and enacted a law that does not limit the duration of EBRs relied on by fax advertisers. Only if Congress's balance turns out to be wrong after significant experience reflected in a record of complaints arising under this new regime, and EBRs of long duration are determined to have caused a significant number and proportion of complaints in the period after the JFPA is implemented, would the FCC have authority to limit the duration of fax EBRs and to determine the time frame that would be appropriate specifically for this commercial fax environment.

B. The Commission Has Limited Authority to Exempt Non-Profit Associations From the Notice Requirements; Commentors Have Failed to Justify Exercising That Limited Authority

Not surprisingly, non-profit trade and professional associations ("associations") urged the FCC to exempt them from the notice requirements of the JFPA. Nevertheless, there are compelling arguments against creating such an exemption. Most importantly, organization members would not be informed that they have a right to opt out, and might even be confused

[14] Indeed, there is scant evidence in the record that legitimate fax advertisers have engaged in abuse at all.

into believing that they do not have the same rights with respect to advertising faxes from non-profit associations that they do with respect to such faxes from commercial businesses.

Furthermore, many of the commenting organizations appear not to understand that the statutorily-limited exemption would not relieve them of the recordkeeping and opt-out requirements themselves, but only the notice requirements. The JFPA mandates that businesses *and* associations establish and maintain opt-out mechanisms, including cost-free ways to opt out, and maintain and honor the resulting do-not-fax lists. The Commission does not have the authority to change these requirements. Thus, the only burden the FCC may remove is the requirement to provide the opt-out notice itself—which is merely adding several lines of text to outgoing fax advertisements.

On the other hand, some associations seem to understand this all too well, arguing that it would "burden" them—in the sense of decreased revenues from sales of merchandise or services—to inform their members of their rights, so non-profit organizations should be allowed to keep their members in the dark. Non-profit associations unabashedly advertise credit cards, vacations, rental cars, and many other products and services in direct competition with similar products and services from commercial providers (and, in fact, often in "partnership" with selected commercial organizations by whom they are paid for the privilege); there is simply no justification for exempting advertising faxes from non-profit associations from the notice requirements.

1. Association Members Need Opt-Out Notices to Make Them Aware That They Have the Right to Opt Out of Future Fax Advertisements

The most common theme in the arguments of the commenting associations is that fax advertisements from non-profit associations do not require opt-out notices because "members of

associations must know how to contact associations of which they are members."[15] This argument completely misses the point. Set aside for the moment the fact that many members may not, at the time they receive an unwanted advertising fax from an association and might like to opt out, know how to contact the organization. Knowing how to contact an organization does members no good *if they do not know that they have the right to opt out.*

Some commenting organizations seem to assume that this knowledge will seep into recipients' consciousness by virtue of faxes received from commercial businesses, so all that is necessary is for the recipient to have the ability to otherwise figure out how to contact them. Lorman believes that it would much more likely work the other way: because fax advertisements from businesses *do* contain opt-out notices, fax advertisements from associations *without* notices would confuse recipients into thinking that they did not have opt-out rights with respect to associations. Even if they had immediate access to contact information and wanted to opt out, they would be less likely to try because they would have been erroneously led to believe that associations were not required to stop faxing advertisements on request. "Faxes tell me when I have a right to opt out. I must not have that right here."

Furthermore, it is not safe to assume that members have immediate access to contact information for the associations to which they belong even if they do realize they have a right to opt out. It is particularly important to provide opt-out information on each fax advertisement because the JFPA establishes specific methods—including a cost-free method—that senders may use for notification. It is likely that in many instances general contact information—a way just to

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[15] *Comments of American Business Media,* CG Dkt. 05-338 at 16 (filed January 11, 2006). *See also Comments of the National Newspaper Association and Newspaper Association of America,* CG Dkt. 05-338 at 16 (filed January 18, 2006); *Comments of the American Road & Transportation Builders Association,* CG Dkt. 05-338 at 4 (filed January 18, 2006); *Comments of Independent Sector,* CG Dkt. 05-338 at 2 (filed January 18, 2006); *Comments of the National Newspaper Association and Newspaper Association of America* at 16; *Comments of the Mortgage Finance Coalition,* CG Dkt. 05-338 at 12–13 (filed January 18, 2006).

reach someone in a large organizational structure—would not prove useful to members seeking to be added to associations' "do-not-fax" lists. This point is particularly acute because some associations argue that opt-out requests should be invalid if they are not directed to a particular address or number.[16] Accordingly, Lorman urges the FCC *not* to exempt non-profit trade and professional associations from the JFPA notice requirements.

2. The Supposed Burdens on Associations Are Illusory

Some commenting associations argue that the burdens imposed on associations by the notice requirement would be onerous.[17] These associations either do not understand the scope of the contemplated exemption or are being disingenuous. In reality, the burden is so slight as to be completely negligible—the inclusion, clearly and conspicuously on the first page of the fax, of certain opt-out information. At most, several lines of type of a legible size. One simply cannot say in good faith that this is a burden worthy of comment, much less of argument.

Only when combined with tacit, *and incorrect*, assumptions can any "burden" be alleged. The first tacit assumption is that a member would opt out of important, or even essential, communications—notification of meetings or membership ballots, for example.[18] This argument is mistaken in two ways. First, fax transmissions that do not contain advertisements are not governed by the JFPA. Only an organization that just could not resist putting an advertisement on its membership ballot or meeting notification would be affected in the first place. And second, even if the Commission were to exempt associations from the notice requirement, *they would still be obligated to respect opt-out requests from those members who were resourceful*

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16 *See, e.g. Comments of American Business Media* at 14–15.

17 *See, e.g. Comments of the National Multi Housing Council*, CG Dkt. 05-338 at 3 (filed January 18, 2006); *Comments of the National Automobile Dealers Association*, CG Dkt. 05-338 at 4 (filed January 18, 2006).

18 *See, e.g. Comments of the American Society of Association Executives*, CG Dkt. 05-338 at 8 (filed January 18, 2006).

enough to realize, even without the notice, that they had a right to opt out, and to figure out how to assert that right, so the exemption would not solve the "problem" for those associations.

Exemption or no, the only way for an association to ensure that it can fax a document to its entire membership is to make sure that it does not contain advertising. The only difference would be the number of members who opted not to receive advertisements: everyone who wanted to avoid such ads, if associations are required to include opt-out notices, or fewer if the Commission allows associations to keep their members in the dark regarding their right to opt out.

This logic applies with equal force to the second tacit assumption of some commenting associations—that the burden of recordkeeping would be too high.[19] Whether or not the FCC adopts an exemption for associations from the notice requirements, associations will still be required to maintain a do-not-fax list and to honor opt-out requests from their members. The only question is whether they will be required to include a notice—several lines of text—to inform members of their right to be placed on such lists. Lorman respectfully urges the Commission to give association members the information they need to manage the flow of fax advertisements, both from businesses and from associations.

The American Bar Association ("ABA") details its practices with respect to advertising faxes sent to members—practices that appear to meet, or nearly meet, the requirements of the JFPA—and then argues strenuously that "being forced to follow the generic notice procedures of Section 2(c) of the JFPA" would put an unacceptable burden on the ABA.[20] The gravamen of the ABA's argument appears to be that the only way it is willing to present an opt-out

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[19] *See, e.g. Comments of the Society for Human Resource Management,* CG Dkt. 05-338 at 6 (filed January 18, 2006).

[20] *Comments of the American Bar Association* at 2–3.

opportunity to a member is as a part of a comprehensive member preferences profile. Given that the JFPA requires the ABA to honor "do-not-fax" requests, it is simply absurd to argue that the ABA cannot manage to activate this preference without also presenting the member with a further menu of choices. This could easily be done with a web page with a single checkbox linked to the member profile database, or manually by someone answering a toll-free number.[21] And again, ABA members have the statutory right to opt out from receiving fax advertisements from the ABA, a right that is not subject to the Commission's discretion here. The only question is whether the ABA and similar associations will be allowed to hide this right from their members and try to make it harder to exercise.

3. There Is No Relevant Difference For Notice Purposes Between Associations and Businesses

In their comments, associations argue that there is a categorical difference between them and commercial businesses. One strain of this argument is the implication that non-profit associations are morally superior to for-profit businesses—the "halo effect" of the words "non-profit," which bring to mind charitable and humanitarian organizations. The other strain asserts that associations have a different relationship with their members than businesses have with their customers. Both of these are mistaken, and neither justifies treating associations differently from businesses for purposes of the opt-out notice requirements of the JFPA.

[21] The ABA seems to indicate at times that an exemption from the notice requirements might apply to non-members with whom the ABA has an EBR (non-member attendees of its CLE programs, for example). *Id.* The American Society of Association Executives also seem to indicate that it may believe the exemption would extend to "donors[] and other constituencies." *Comments of the American Society of Association Executives* at 8. Congress contemplated no such extension. Even should the FCC exempt associations from the opt-out notice requirements, it should clarify that the exemption extends *only* to members and *only* to communications in furtherance of the organization's tax-exempt purpose.

Non-profit trade and professional associations are exempt from taxation under Section 501(c)(6) of the Internal Revenue Code ("IRC"), as amended.[22] Section 501(c)(6) organizations are not humanitarian or public interest organizations or charities, which are exempted from taxation under Section 501(c)(3) of the IRC.[23] Rather, they are "association[s] of persons having some common business interest, the purpose of which is to promote such common interest...."[24] The National Football League is a 501(c)(6) organization, as is the National Hockey League. Associations are a $21 billion (annual) industry.[25]

Thus, both for-profit businesses and non-profit associations exist to promote business interests—businesses do so directly, and associations do so indirectly. Associations do not provide any public benefit—there is no "halo" over the associations identified in the JFPA. Their motivation is the same as that of an individual business—to increase business profits—but on a coordinated and larger scale.

Further, the relationship between associations and their members is remarkably similar to the relationship between businesses and their customers. Commenting associations claim that "[t]he relationship between nonprofit associations and their members stands in stark contrast with that which exists between commercial entities and potential customers. …[A]n association without members is no association at all."[26] The same is true—indeed, more so—with for-profit businesses. It is certainly true that a business without customers "is no business at all," to paraphrase the Named State Broadcasters.

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22 26 U.S.C. § 1.501(c)(6).

23 26 U.S.C. § 1.501(c)(3).

24 26 U.S.C. § 1.501(c)(6).

25 American Society of Association Executives, <http://www.asaenet.org/> (visited January 28, 2006).

26 *Comments of the Named State Broadcasters Associations*, CG Dkt. 05-338 at 5 (filed January 18, 2006); *See also Comments of the American Society of Association Executives*, CG Dkt. 05-338 at 8 (filed January 18, 2006) ("fundamental difference in character from for-profit businesses").

The Direct Marketing Association notes that a study by the American Society of Association Executives "found that member dues payments are the largest revenue source that associations have; they receive on average about 40 percent of their total revenue from dues."[27] This means that the majority of associations' revenues—some 60%—comes from other sources, including the sale of goods and services to their members, often in conjunction with for-profit "business partners" that pay for the privilege. Businesses generally receive nearly 100% of their revenue from customer purchases, and repeat business is extremely important to them. In sum, for a business to succeed and last it must be just as beholden and just as responsive to its customers as associations are to their members, if not more so.

The Society of Human Resource Management argues for an exemption on the basis of the small size and limited resources of some associations.[28] However, associations and businesses cannot be distinguished by size or resources. There are large and small, and wealthy and poor examples of both. Indeed, many small businesses consist of only one or two people struggling to make a living. Just as small businesses live with the same notice requirements as large businesses, so should associations large and small live with those same requirements.

Some associations argue that voluntary membership in an association is a sign that the member wishes to receive fax advertisements from the association,[29] that receiving such advertisements is "part of the reason they pay for membership,"[30] or even that membership in an association should be construed *de facto* to constitute "express invitation or permission" to

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[27] *Comments of the Direct Marketing Association* at 2.

[28] *Comments of the Society for Human Resource Management* at 6.

[29] *See Comments of the American Road & Transportation Builders Association* at 4; *Comments of Independent Sector* at 3; *Comments of the Mortgage Finance Coalition* at 13; *Comments of the Named State Broadcasters Associations* at 6.

[30] *Comments of the Direct Marketing Association* at 4.

receive fax advertisements from the association.[31] While many members may welcome fax advertisements from associations, the JFPA does not interfere with their interests. They will see the notice and opt-out information, but they will not exercise their right to opt out. The JFPA was intended to protect the rights of recipients who *do not* wish to receive fax advertisements. Indeed, many members of associations may not even be strictly "voluntary" members—those who are required to join as a condition of employment or professional qualification, for example. There is no "express invitation or permission" from members required to join an association, and no special responsiveness as well—a business must attract and keep customers, but associations do not need to attract or be responsive to members who are externally required to join. Because the notice requirement does not interfere with association members who desire to receive fax advertisements, but does facilitate the rights of those members who *do not* wish to receive them, associations should not be exempted from the notice requirements of the JFPA.

Finally, the National Association of Realtors ("NAR") argues that associations should be exempt because their advertising faxes do not constitute the high volume, unexpected solicitations that the TCPA was enacted to address.[32] This argument misses the point of the JFPA. Congress enacted an established business relationship exception to the general ban on sending unsolicited fax advertisements precisely to address this issue. The advertising faxes sent pursuant to EBRs by associations *and businesses* have already been determined by Congress not to be the sort of unexpected communications that the TCPA prohibits. NAR is, therefore, drawing a distinction without a difference. To the recipient who desires not to receive fax

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[31] *Comments of the Named State Broadcasters Associations* at 3; *Comments of the American Society of Association Executives* at 3. ASAE would go so far as to construe membership to be an express invitation to send fax advertisements *even if* the association obtained the member's fax number "through publication on a website, brochure, business card, advertisement, public directory, letterhead, etc." *Id.*

[32] *Comments of the National Association of Realtors* at 15.

advertisements, advertisements sent by associations are no more expected or wanted than those sent by businesses with whom the recipient has a relationship. Indeed, in the business relationship, the customer at the very least expressed interest in, and in many cases actually bought, goods or services from the sender. A member may have joined an association, or been required to join, with no knowledge of or interest in the credit cards, office supplies, cruises, or insurance policies being advertised by the association. Businesses must instruct recipients of their right to opt out and how to do so, giving recipients knowledge and the ability to control whether or not they receive faxes. The question is whether the FCC will allow associations to keep their members in the dark.

4. Determining the Tax-Exempt Purpose of Associations Would Be a Nightmare for the FCC, and Internal Revenue Regulations and Decisions Would Not Help

Many of the commenting associations assert that the FCC need not involve itself in the determination of the "tax-exempt purpose" of associations and the fax advertisements they send.[33] Unfortunately, that would not be the case. Every time a complaint was filed, the FCC would find itself adjudicating the "tax-exempt purpose" of the association and of the individual faxes in question. While the Internal Revenue Code ("IRC") and the Internal Revenue Service ("IRS") decisions would certainly be guides for the FCC's analysis, they would not eliminate it except in the exceptionally rare case in which the IRS had actually adjudicated the specific issue involving the same sender and marketing campaign. In fact, the IRC and the IRS decisions would very likely complicate the FCC's job.

[33] *See, e.g. Comments of the Direct Marketing Association* at 3–5; *Comments of the American Financial Services Association* at 5–6; *Comments of the American Bankers Association* at 6; *Comments of American Business Media* at 16.

The most likely source of guidance from the IRC would be the Unrelated Business Income Tax ("UBIT") rules,[34] which govern the circumstances under which non-profit associations must pay tax on "unrelated business income." The purpose of the UBIT rules is to ensure that tax-exempt organizations are not advantaged compared to for-profit businesses offering similar goods and services in competition with them.[35] The meaning and application of these rules have been, and remain, hotly contested, even as applied by the experts at the IRS and the courts, and are not the stable source of black-letter law that could make the FCC's task—without that experience and expertise—easier. Indeed, the FCC and IRS might even reach conflicting decisions as they separately applied the UBIT rules.

The UBIT rules provide another compelling reason for <u>not</u> exempting associations from the notice requirements. If tax-exempt associations advertise commercial goods or services such as credit cards and rental cars directly to their members, under the UBIT rules the associations are liable for tax on the unrelated business income. Consequently, if the UBIT rules were to govern the FCC's determination of the "tax-exempt purpose," such fax advertisements would need to include an opt-out notice. However, associations can sidestep this taxation under the UBIT rules by having a commercial "business partner" do the actual sending, in which case—although the association's name is on the solicitation—the association's take is a tax-exempt "royalty" payment.

Associations would likely want to have it both ways, and would argue that such cooperative advertisements were "sent" by the for-profit partner to obtain a UBIT exemption from taxation, then turn around and argue that they were not required to contain opt-out notices

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[34] 26 U.S.C. §§ 511–13.

[35] *United States v. American Bar Endowment*, 477 U.S. 105, 114 (1986) (citing H.R.Rep. No. 2319, 81st Cong., 2d Sess., 36 (1950)) ("The undisputed purpose of the unrelated business income tax was to prevent tax-exempt organizations from competing unfairly with businesses whose earnings are taxed.").

because they were effectively "sent" by the association and the activity was exempt under the UBIT rules, which controlled the FCC's analysis. If the associations prevailed, they would achieve the perverse result that a fax sent by the association would require an opt-out notice, while the same fax would *not* require such a notice if it was sent by the for-profit business partner.

Thus, if the Commission were to exempt associations from the notice requirement, it would be required to determine whether each joint-venture fax advertising campaign was exempt from the notice requirement, and the very rules the FCC had looked to for help in its determination would provide a ground to argue for a perverse result. Since each advertising campaign by each association would present unique facts—whose name appears on the solicitation? who approved the ad copy? who loaded the membership list into the fax machine? who pressed the send button? how was the amount of compensation to the association determined?—it is reasonable to believe that the FCC would need to visit this issue repeatedly.

Exempting associations from the notice requirements would unavoidably involve the FCC in adjudicating intricate matters of hotly-contested tax law beyond its expertise. It should therefore refrain from adopting the exemption.

5. Associations Concede That Exemption From the Notice Requirements Will Reduce the Instances of Opt-Outs; They Seek to Benefit From Keeping Their Members Uninformed of Their Rights to Opt Out

At the end of the day, the argument of the commenting associations reduces to a naked assertion of privilege, which cannot be allowed to prevail. American Business Media ("ABM") candidly admits that its goal is to make it harder for members to opt out: "Exempting association faxes from the notice requirement will tend to render opting out more of a conscious effort."[36]

[36] *Comments of American Business Media* at 16.

Similarly, ABM urges the Commission not to put "unreasonable roadblocks in the path" of sending fax advertisements to members.[37] Other commenting associations are less candid, and have made fanciful attempts to show that some other harm would befall them if the FCC were not to exempt associations from the notice requirements. As shown above,[38] these arguments fail. The only "burden" therefore is that more members are likely to opt out of future fax advertising if associations' fax advertisements contain notices than if they do not, which might affect association revenue.

In essence, associations argue that they are entitled to profit from keeping their own members in the dark, confused about what rights they have and how to go about asserting those rights. Several commenting associations even seem to feel that the JFPA does not impose an absolute requirement on associations to honor their members' opt-out requests. For example, according to the American Society of Association Executives, if a member makes an opt out request, it is not certain under the JFPA that it must be honored—rather, "it is highly likely that the association will comply."[39] Four commenting associations not only see this possibility, but go further and suggest that if associations are unresponsive, members can always quit—which, of course, in many cases they cannot actually do.[40]

Associations are not entitled to ignore opt-out requests, and the FCC may not authorize them to do so. The FCC's authority is limited to deciding whether members should receive notice of their opt-out rights on fax advertisements from associations. But the arrogance of these statements by commenting associations about the possibility of ignoring members' opt-out

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37 *Id.*

38 *Supra*, Section II.B.2.

39 *Comments of the American Society of Association Executives* at 9.

40 *See id.; Comments of the Named State Broadcasters Associations* at 6; *Comments of the National Newspaper Association and Newspaper Association of America* at 16; *Comments of the American Bankers Association* at 6.

requests flies in the face of their arguments that associations are specially beholden and responsive to their members.

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Associations market goods and services to their members to raise revenue—often in direct competition with commercial businesses, and often in cooperation with selected for-profit "business partners" that pay for the privilege. Some of these goods and services might at least arguably be related to the organization's broad purpose, while some—for example, credit cards, vacations, insurance, and rental cars—seem to have no relation to the association's tax-exempt purpose, but rather serve only to raise revenue. Requiring associations to comply with the notice requirements of the JFPA is the only way to avoid having the FCC become the arbiter of which marketing campaigns are sufficiently related to be "in furtherance of" the association's tax-exempt purpose and which are not. Moreover, it may be the only way to prevent the perverse result discussed above,[41] in which an identical fax advertisement might require an opt-out notice if it were sent directly by the association, but *might not* require the notice if it were sent under the association's name by a "business partner," depending on the facts of the particular case.

Associations are simply not entitled to an exemption from the notice requirements of the JFPA. Although they may be non-profit, they are not charitable or humanitarian organizations—their purpose, like that of commercial businesses, is to improve business profits. They are not entitled to increase their revenues by trampling the rights of their members, some of whom were required to join for external reasons and are not at liberty to resign, or where the impact on the member's business or profession makes resigning impracticable and the member sees no option but to continue receiving unwanted fax advertisements from the association.

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[41] *Supra*, Section II.B.4.

Furthermore, a litany of troubles would attend such an exemption. Association members would at best find it more difficult to opt out from receiving future fax advertisements from associations, or to find out how to submit an effective request, and might very well be confused into thinking that they did not have a right to opt out at all since the opt-out notice they would be accustomed to seeing on other faxes would be missing. The FCC would be unavoidably mired in determining the "tax-exempt purpose" of every association that faxed its members, and of every fax sent. Businesses that compete directly with associations and with their commercial partners would be disadvantaged.

Nowhere in their comments have the associations provided even a hint of justification for the privileged treatment they seek, or for keeping their members in the dark. For all of the reasons given above, they manifestly *do not* deserve it. Lorman respectfully urges the Commission not to bow to pressure from the association lobby. Do not exempt non-profit trade and professional associations from the notice requirements of the JFPA. Instead, ensure that *all* fax recipients receive the information they need.

C. The Commission Should Not Adopt Any Industry-Specific Rules

Several groups of commentors seek special treatment in their comments. As discussed above,[42] some non-profit trade and professional associations illogically urge the FCC to declare that membership in an association constitutes *de facto* express invitation or permission for the association to send fax advertisements to the member. Some associations also urge the FCC to set a different duration limit on EBRs for associations.[43] Financial institutions urge the

[42] *Supra*, Section II.B.3.

[43] *Comments of the Society of Human Resources Management* at 8.

Commission to "recognize[] the unique business relationship between lenders and various intermediaries…."[44]

The Commission should without exception refrain from adopting rules here that single out particular industries or constituencies and further limit the rights of their customers or members. Congress set the parameters governing the relationship between senders and recipients of commercial faxes. The Commission was given limited authority, if certain thresholds were met, to make certain very limited exceptions. No such authority exists for giving certain marketers special treatment. By their nature, regulations implementing statutes are rules of general applicability and should be drafted as such.

[44] *Comments of Bank of America*, CG Dkt. 05-338 at 2 (filed January 18, 2006); *see also Comments of Consumer Bankers Association* at 6–9 (proposing language for the definition of "EBR"); *Comments of Comerica* at 1.

III. CONCLUSION

For all of the foregoing reasons, the Commission cannot at this time and should not in any case impose a durational limit on EBRs; should not exempt non-profit trade and professional associations from the notice requirements of the JFPA, and in any case should clarify that all senders of fax advertisements are required to maintain compliant opt-out procedures, to maintain organization-specific do-not-fax lists, and to honor opt-out requests; and should not single out particular industries or constituencies in the regulations for special treatment disadvantaging their customers or members.

Respectfully submitted,

/s/

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